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6 Attorney for **MARSHALL**

7 UNITED STATES DISTRICT COURT

8 DISTRICT OF NEVADA

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 vs.

12 ERIK MARSHALL,

13 Defendant.
14

2:11-cr-235-GMN-CWH

MOTION FOR PRE-SENTENCING
PSYCHIATRIC AND
PSYCHOLOGICAL EVALUATION
PURSUANT TO 18 U.S.C. § 4244(a)&(b)

(Motion Unopposed by the Government)

15 COMES NOW defendant ERIK MARSHALL, by and through his attorney of record, PAUL
16 D. RIDDLE, Assistant Federal Public Defender, and hereby files this motion for a Federal Bureau
17 of Prisons pre-sentencing competency evaluation of defendant Erik Marshall.

18 On August 20, 2012, Marshall pleaded guilty to Count 2 of the instant matter's pending
19 federal criminal indictment. (*See Court's Record (CR) 38 (change of plea minutes); see also CR 39*
20 (*written plea agreement*)). The count of conviction is transporting child pornography in violation
21 of 18 U.S.C. § 2252A(a)(1). This Court has set the sentencing date for April 12, 2013.

22 Defense counsel Paul D. Riddle now hereby informs the Court that Marshall's mental health
23 condition has deteriorated markedly since the time of change of plea proceeding. Although counsel
24 believed, and still believes, Marshall was competent to enter a plea of guilty on August 20, 2012,
25 counsel no longer believes Marshall is competent to continue with further court proceedings.

26 That the first hint of mental state deterioration occurred shortly after the change of plea
27 proceeding and has accelerated in severity since. Marshall, at this time, no longer exhibits cogent
28 thought processes or patterns, engages in fanciful and magical thinking, lacks any real perspective

1 on his current situation, and, most important, defense counsel now finds it virtually impossible to
2 communicate with Marshall. Defense counsel is no longer able to adequately represent Marshall at
3 sentencing due to his inability to communicate with defense counsel and to understand the nature
4 and significance of the proceeding. *See generally Medina v. California*, 505 U.S. 437, 450 (1992)
5 (“defense counsel will often have the best-informed view of the defendant's ability to participate in
6 his defense”).

7 There is no question a criminal defendant has a right to due process and effective assistance
8 of counsel at sentencing. Marshall’s current mental conditions puts both rights in jeopardy.

9 “Sentencing is a critical stage of the criminal process,” *Boardman v. Estelle*, 957 F.2d 1523,
10 1525 (9th Cir.1992) (citing *Mempa v. Rhay*, 389 U.S. 128, 134(1967)), and the defendant's
11 allocution, “is an essential element of a criminal defense.” *Id.* at 1526. A defendant is competent to
12 stand trial and be sentenced if he has both a “sufficient present ability to consult with his lawyer with
13 a reasonable degree of rational understanding and a rational as well as factual understanding of the
14 proceedings against him.” *United States v. Fernandez*, 388 F.3d 1199, 1251 (9th Cir. 2004).
15 Competence at sentencing therefore requires, among other things, that the defendant be able to assist
16 in his own defense by participating in his “elementary right” of allocution. *Boardman*, 957 F.2d at
17 1527 (quoting *United States v. Behrens*, 375 U.S. 162 (1963)).

18 The test for competency at a sentencing hearing is “whether the defendant is able to
19 understand the nature of the proceedings and participate intelligently to the extent participation is
20 called for.” *Chavez v. United States*, 656 F.2d 512, 518 (9th Cir. 1981). A district court's duty to
21 inquire into a defendant's competency is triggered if the judge is confronted with “substantial
22 evidence” to doubt the defendant's competency. *See id.* at 517-18; *accord United States v. Dreyer*,
23 705 F.3d 951, 960 (9th Cir. 2013).

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1 The procedures for a mental health and competency inquiry for a convicted, but not yet
2 sentenced, defendant are found at 18 U.S.C. § 4244. Section 4244(a) allows for defense counsel,
3 government counsel, or the court sua sponte to request a hearing on the defendant's competency to
4 be sentenced. While defense counsel generally is supposed to move for a competency hearing
5 "within ten days after the defendant is found guilty," this Court is free to order a competency hearing
6 at any time before sentencing.¹

7 Under 18 U.S.C. § 4244(b) and § 4247(b) & (c), this Court may order a psychiatric or
8 psychological examination be conducted prior to the competency hearing and that the ensuing report
9 be filed with the Court.

10 THEREFORE, counsel for Marshall submits this motion for defendant to submit to a
11 psychological and psychiatric examination to determine whether the defendant may presently be
12 suffering from a mental disease or defect rendering him mentally incompetent to the extent that he
13 is unable to understand the nature of consequences of Marshall's forthcoming sentencing
14 proceedings and to properly communicate with defense counsel in order to present the best
15 mitigation case possible.

16 FURTHER, that defendant shall be forthwith transported to the closest Federal Bureau of
17 Prisons (BOP) facility that conducts psychological and psychiatric evaluations.

18 FURTHER, that the examination shall be in accordance with Title 18, United States Code,
19 Sections 4241, 4244, and 4247 and Rule 12.2(c) of the Federal Rules of Criminal Procedure.

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24 ¹ To the extent this Court is concerned with the ten day time limitation, defense
25 counsel submits any delay in this motion be excused for good cause. Defense counsel had always
26 perceived some oddities in Marshall's behavior, yet believed Marshall competent. It wasn't until
27 recently that defense counsel, in consultation with Marshall's family, drew a definitive conclusion
28 that Marshall is not competent to proceed to sentencing.

Defense counsel does not make this motion lightly as it is not apparent a competency
exam is in the client's best interests. Defense counsel has a duty, however, as an officer of the court
to bring this situation to the Court's attention. Moreover, counsel simply is not able to adequately
communicate with Marshall at this time rendering it constitutionally problematic to proceed to
sentencing at this time.

1 FURTHER, that defendant shall be held in said facility for a reasonable period of time, not
2 to exceed forty-five days, unless extended by further order of the Court upon showing of good cause
3 by the Director of said facility or pursuant to other appropriate motion for a period of time up to
4 thirty days.

5 FURTHER that within forty-five days from the date of entry of the Order, the Director of said
6 facility at which the examination has been conducted, shall prepare, or cause to be prepared, a
7 psychiatric or psychological report of the defendant, and that the Director shall send copies of such
8 psychiatric or psychological report to the Clerk of the United States Court for the District of Nevada,
9 to Susan Cushman, Assistant United States Attorney, and Paul D. Riddle, counsel for defendant
10 Erik Marshall.

11 FURTHER, that following the defendant's examination, he shall be forthwith transported
12 back to the District of Nevada for a competency hearing pursuant to 18 U.S.C. § 4244(a).

13 FURTHER, that said examination shall be in accordance with 18 U.S.C. §§ 4241, 4242, 4244
14 and 4247.

15 FURTHER, that the said report prepared pursuant to this Order shall include:

- 16 (1) Defendant's history and present symptoms;
- 17 (2) A description of the psychiatric, psychological or medical tests that were
- 18 employed and their findings;
- 19 (3) The examiner's findings; and

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1 (4) The examiner's opinions as to diagnosis, prognosis, and whether the defendant
2 is competent to proceed to sentencing, the test of which is whether he may presently
3 be suffering from a mental disease or defect rendering him mentally incompetent to
4 the extent that he is unable to understand the nature and consequences of the
5 proceedings against him or to assist properly in preparing for sentencing.
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7 Respectfully submitted,

8 RENE L. VALLADARES
9 FEDERAL PUBLIC DEFENDER

10 */s/ Paul D. Riddle*

11 PAUL D. RIDDLE
12 Assistant Federal Public Defender
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15 **IT IS SO ORDERED** this 8th day of April, 2013.
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18 Gloria M. Navarro
19 United States District Judge
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